No. 01-902

IN THE

Supreme Court of the United States

THE CITY OF TAMPA, FLORIDA,

Petitioner,

v.

VOYEUR DORM, L.C., ENTERTAINMENT NETWORK, INC., AUTUMN DAWN MARENGER; and 2D&H, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether municipal zoning regulations, which by their very nature deal only with the use of land, can be used as a pretext to censor communication and expression which takes place only via the "Internet," where such communication, expression, and even commerce are conducted in "virtual space," particularly when the United States Supreme Court has consistently recognized that geographical concepts are totally inapplicable to computer based global communications.

2. Whether a municipal zoning regulation may be "administratively interpreted" in such a way as to make a mockery of the "secondary effects doctrine" necessary to insulate adult entertainment zoning regulations from being unconstitutionally content based, as the United States Supreme Court has consistently held in *Young v. American Mini Theaters, Inc.*, and *City of Renton v. Playtime Theatres, Inc.*, and their progeny.

CORPORATE DISCLOSURE STATEMENT

Respondent, Voyeur Dorm, L.C., is a Florida limited liability company whose sole operating member is Respondent, Entertainment Network, Inc., a Florida corporation. Respondent, 2D&H, Inc., is also a Florida corporation. The Respondent entities are not publicly held, and there are no parent companies or subsidiaries which are publicly held, nor does any publicly held company owns any of the Respondent corporations' shares of stock.

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REASONS FOR DENYING THE WRIT

1. The Eleventh Circuit's Reversal of a District Court Order Granting Summary Judgment, Which is Not in Conflict With Any Decision of the United States Supreme Court Nor Any United States Court of Appeals, Does Not Justify The Exercise of Certiorari Jurisdiction.

While Rule 10 sets forth the latest attempt to simplify the generalizations long known to be relevant to the grant of certiorari, it is clear that a petition for writ of certiorari "will be granted only when there are special and important reasons therefor." In the instant case, the procedural status of this matter alone supports the denial of the requested writ. From a procedural standpoint, the immediate opinion below, reported at 265 F.3d 1232 (11th Cir. 2001), simply reverses the Order of the District Court granting the City of Tampa's Motion for Final Summary Judgment. The Eleventh Circuit Opinion does not direct entry of judgment in favor of the Respondents herein, and, even though the Opinion eloquently and accurately points out the absurdity of the original grant of summary judgment, it would appear that the case remains at issue under the auspices of the District Court.

This position is supported by the facts that no motion filed under FRAP 41 was made to stay the issuance of the mandate from the Eleventh Circuit, no motion to stay or recall the mandate was made under Eleventh Circuit Rule 41-1, and, simply by analyzing the procedural posture of this matter, it would appear that the case is at issue and active before the District Court. Rule FRAP 41(c) provides that the mandate is effective when the Circuit Court issues it. A Court of Appeals' judgment or order is not final until issuance of a

mandate, at which time the party's obligations become fixed. Additionally, neither the filing nor the granting of the petition for writ of certiorari operates as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court. *See St. Regis Paper Company v. United States*, 365 U.S. 857, 858 (1961), where this Court, in granting certiorari, also granted petitioner's motion for stay tolling the further running and accumulation of forfeitures pursuant to a statute as applied to the court below, pending this Court's disposition of the writ of certiorari, noting that the grant of certiorari alone would not have operated as such a stay.

Of course, the issuance of the lower court's mandate does not destroy the power of this Court to review the lower court's judgment (*see United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)), it simply underscores the status of the instant case as being one where the District Court's drastic and extraordinary grant of summary judgment was reversed, obviously because there were "genuine issues as to material facts" that remain to be determined before the District Court. Certiorari jurisdiction, while clearly inappropriate is also undeniably premature.

2. The Decision of The Eleventh Circuit is Not in Conflict With Any Decision of This Court And Eloquently And Appropriately Rejected The Absurdity of The District Court's Application of Municipal Regulations Dealing With Real Property to Forms of Communication Taking Place in Virtual Space Over The Internet.

In its continued attempt to beat a virtual dead horse with frayed computer cables, the Petitioner again tries to improperly inflame disciplined judicial minds with salacious but irrelevant descriptions of the "content" of communication taking place over the internet. In the Petition, extensive reference is made to this Court's evaluation of the constitutionality of *zoning ordinances* that dealt specifically with adult entertainment businesses which were allegedly problematic and, on first blush, clearly unconstitutionally content based. This same argument was presented to the Eleventh Circuit and was appropriately rejected.

In addition to the procedural reasons for denying certiorari review, it is clear that the Petitioner in this action has tried to inappropriately characterize a judicial analysis of the *facts* involved in the instant matter as a misapplication of legal principles that somehow manifest the "special and important reasons" justifying the exercise of certiorari jurisdiction. The Eleventh Circuit, in concluding that municipal zoning legislation is not applicable to communication taking place over the internet, has raised neither any important constitutional issue nor any important federal statutory issue. It has simply concluded, properly, that an analysis of the facts in the case simply does not support the application or analysis of adult entertainment zoning legislation.

As this Court has repeatedly stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Additionally, since the instant case originally turned on a *municipal* administrative decision (that being the preposterous stretch of zoning definitions by the Petitioner's Zoning Administrator to attempt to censor communication over the internet), it has consistently been the position of this Court to hold that the responsibility of assessing a record to determine whether even *federal* agency findings are supported by substantial evidence "is not ours," but "primarily" that of the court of appeals. "This Court will intervene only in what ought to be the rare instances where the standard appears to have been misapprehended or grossly misapplied." *Mobile Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

In the instant action, the Eleventh Circuit properly evaluated the factual issues and concluded the following:

> "The threshold inquiry is whether section 27-523 of Tampa's City Code applies to the alleged activities occurring at 2312 West Farwell Drive. Because of the way we answer that inquiry, it will not be necessary for us to analyze the thorny constitutional issues presented in this case.
>
> "Section 27-523 defines adult entertainment establishments as [a]ny premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual

> activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section." 265 F.3d 1232, 1235 (11th Cir. 2001).

After identifying the inquiry, the Eleventh Circuit cut through the City's attempt to cloud the facts with innuendo, and properly concluded as follows:

> "In opposition, Voyeur Dorm argues that it is not an adult use business. Specifically, Voyeur Dorm contends that section 27-523 applies to locations or premises wherein adult entertainment is actually offered to the public. Because the public does not, indeed cannot, physically attend 2312 West Farwell Drive to enjoy the adult entertainment, 2312 West Farwell Drive does not fall within the purview of Tampa's zoning ordinance. We agree with this argument.
>
> "The residence of 2312 West Farwell Drive provides no "offer[ing] [of adult entertainment] to members of the public." The offering occurs when the videotaped images are dispersed over the internet and into the public eye for

consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public. As a practical matter, zoning restrictions are indelibly anchored in particular geographic locations. Residential areas are often cordoned off from business districts in order to promote a State's interest. *See, e.g., City of Renton, 475 U.S. at 50, 106 S.Ct. 925* ("A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."). It does not follow, then, that a zoning ordinance designed to restrict facilities that offer adult entertainment can be applied to a particular location that does not, at that location, offer adult entertainment. Moreover, the case law relied upon by Tampa and the district court concerns adult entertainment in which customers *physically attend* the premises wherein the entertainment is performed. *[FN2]* Here, the audience or consumers of the adult entertainment do not go to 2312 West Farwell Drive or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in "virtual space." *[FN3]* While the district court read section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*, we hold that section 27-523 does not apply to a residence at which there is no public offering of adult entertainment. Accordingly, because the district court misapplied section 27-523 to the residence of 2312 West Farwell Drive, we reverse the district court's order granting summary judgment to Tampa. Since the resolution of this threshold issue obviates the need for further analysis, we do not reach the remaining issues regarding the constitutionality of

Tampa's zoning restrictions as applied to Voyeur Dorm.

"*FN2.* The body of case law applying legislative restrictions to adult entertainment establishments relies on adverse effects that debase adjacent properties. *See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)* (relying on the negative secondary effects doctrine to uphold a city's ordinance as applied to an erotic dancing establishment); *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)* (upholding a zoning ordinance that prohibited adult motion picture theaters from operating in certain locations based upon the negative secondary effects created by such theaters); *Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)*; *Flanigan's Enter., Inc. v. Fulton County, 242 F.3d 976 (11th Cir.2001)* (holding that a local ordinance failed to further the county's purported concern with negative secondary effects and was thus unconstitutionally applied); *Ward v. County of Orange, 217 F.3d 1350 (11th Cir.2000)*; *Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir.1998)*; *Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir.1985).*

"*FN3. See Reno v. ACLU, 521 U.S. 844, 851, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997)* (stating that internet communication is "a unique medium — known to its users as 'cyberspace' — located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet")." *Id.* at 1236, 1237.

As a reasoned and impartial analysis of the above statements clearly shows, the Eleventh Circuit decision does not, in any way, as the Petitioner states "conflict with the decisions of the United States Supreme Court ... ."

3. The Decision of the Eleventh Circuit Does Not "Read Language" Into the City Code's Definition of an Adult Entertainment Establishment, It Simply Applies the Appropriate Law to the Facts And Reverses the Absurd Result Urged by Petitioner and Misguidedly Embraced by the District Court.

In their Petition, the City essentially suggests that the "literal" application of the language of the City Code must operate as a complete and total obstacle to the application of appropriate judicial reasoning. Acceptance of the City's position would render its adult use ordinance unconstitutional and void under the overbreadth doctrine, since every hotel room in which motion pictures of even the mildest sexually explicit nature were offered would *per se* then be an adult entertainment establishment. Clearly, this position does not advance any governmental interest and would leave no other conclusion than the fact that the legislation is not "narrowly tailored," and, thus, even more invalid. Naturally, the City does not concede that the vacuous misapplication and misinterpretation of poorly drafted municipal legislation would set the "secondary effects doctrine" on its ear. Contrary to the superfluous reference to the holding in *Hughes Aircraft Company v. Jacobson*, 522 U.S. 432, 438 (1999), the operative language to focus on should be "As in any case of statutory construction, our analysis *begins* with 'the language of the statute' . . . And where the statutory language provides a clear answer, it ends there as well." *Id* (Emphasis added).

Ultimately, even though an analysis may *begin* with "the language" of any legislation being evaluated, it has *always* been the responsibility and obligation of the courts to avoid any application of statutory language which would manifest an absurd result. For any court to embrace the position urged by the City, the result would clearly be entirely unreasonable and would directly conflict with the unique exception to the unconstitutionality of "content-based" legislation carved out by the "secondary effects doctrine" articulated in *Young v. American Mini Theatres, Inc., supra, City of Renton v. Playtime Theatres, Inc., supra*, and their progeny.

Regardless of any considerations to the contrary, the house at 2312 West Farwell Drive, Tampa, Florida, served primarily as the *residence* of the individuals whose lives were documented therein. It is interesting and important to note that, prior to the direction to seek an "interpretation," from the City of Tampa's Zoning Coordinator, with the subsequent procedural requirement that the appeal of her determination required issuance of a "Notice" to surrounding owners, the address of the subject home was never disclosed to the public in any fashion.

Undeniably, the Zoning Coordinator revealed the flaws in her interpretation by stating that her conclusions regarding the use of the premises were established, not by viewing the premises, but by accessing the website ("the web page can be found by going to Yahoo! and entering voyeur dorm on the search . . ."), inappropriately focusing on *her* belief that the name of the website was "advertising the adult nature of the entertainment," and concluding that "Internet viewers," were able to "monitor" activities occurring at the residence, and further imputing "web page . . . scenes," and other *webpage* statements to be determinative of, not the *webpage*, but of the *home* at 2312 West Farwell Drive, Tampa, Florida.

There was absolutely nothing in the definition of "adult entertainment establishment" of Section 27-523, City of Tampa Code (quoted by the Zoning Coordinator in her letter as the basis for her decision), which authorized the interpolation or extrapolation of information gathered from a website, the name of any such website, or the concept of "advertising," whatsoever, as the basis for any determination that a particular *premises* was or was not an "adult entertainment establishment."

To underscore the absurdity of the result urged by the Petitioner, it is well settled that zoning ordinances which purport to regulate any form of "adult-entertainment" are unconstitutionally "content based" unless it can be shown that any challenged legislation is designed to target the so called "secondary effects" of adult businesses. The first case to address this issue was *Young v. American Mini Theaters, Inc., supra.* The "secondary effects" identified in the *Young* case were based on the belief that the concentration of the businesses sought to be regulated by the City of Detroit in its "anti-skid row" legislation "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution and encourages residents and businesses to move elsewhere."

The second important case dealing with adult entertainment businesses is the case of *City of Renton v. Playtime Theatres Inc., supra.* Again, the *Renton* case recognized that any zoning restrictions placed on businesses deemed to be "adult entertainment" would be unconstitutionally "content based" unless the zoning ordinance at issue was designed to prevent crime, protect the city's retail trade, maintain property values, and was otherwise the result of "predominate concerns" with the secondary effects of adult businesses and not with the content of adult entertainment itself. A requirement of this concept was

that these adverse secondary effects be established through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

As this case progressed before the District Court, it was clear that the Respondents herein wished to vigorously contest the validity of the Tampa City Council's "findings" as contained in the "record" allegedly asserted as the justification for the adult entertainment zoning restrictions at issue herein. Notwithstanding the fact that no opportunity to contest any findings "ever existed" relative to challenges before the Council, the Respondents wished to demonstrate that there was a significant doubt as to the validity of the City's "record" and the City Council's findings, particularly as they related to any Internet-based "e-commerce" form of communication. There was no possible way that the characteristics of this form of communication could have been considered in the early 1980s or at any time the City of Tampa considered any such "record," or "secondary effects" concerns.

The inapplicability of entirely unrelated and unsupported concerns with "secondary effects" was rejected in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000). This case held: "That a legislative body may rely on foreign studies to establish its interest in a regulation does not relieve that entity from the obligation of demonstrating that the study must be "reasonably believed to be relevant to the problem that the City addresses." (*citing Colacurcio v. City of Kent*, 545 (9th Cir. 1998), and clearly evoking the doctrine enunciated in *City of Renton*). The *Alameda Books* case was the subject of a petition for writ of certiorari which was granted by this Court (__ U.S. __, 121 S. Ct. 1223 (2000)), and on which Oral Argument was entertained on December 4, 2001.

Notwithstanding the outcome of this Court's evaluation of the issues in the *Alameda Books* case, to adopt the City of Tampa's position in their Petition for Writ of Certiorari, would stretch the "exceptional" nature of the "secondary effects doctrine" and would clearly manifest the "violence" previously only threatened to the First Amendment by this arguably unproven and dangerously flexible "doctrine" would certainly have come to pass. If this Court were to allow the retroactive application of an arguably "bogus" secondary effects "record" to justify restrictions on a form of speech that *never existed* when that "record" was created, this stretches the "secondary effects doctrine" to beyond the breaking point and, by analogy, would horrify First Amendment advocates since, by its very nature, *pure political speech* could clearly be the catalyst to "adverse secondary effects" in the form of brawls, corruption, and other "non content-based" consequences. *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: the Evisceration of First Amendment Freedoms*, Washburn L.J., Vol. 37, No. 1, 55-94.

Indeed, in upholding the ordinance at issue in *Renton*, this Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever *evidence* the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 53, 106 S. Ct. 925, 931 (1986) (Emphasis added).

In at least one Circuit, it was held that:

> "When a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its actions serves a compelling state interest

> which cannot be served in a less restrictive way, or (2) that its actions serve a substantial content-neutral state interest . . . it must come forward with . . . evidence . . . justifying . . . reasonable time, place and manner restrictions on speech." *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-173 (3rd Cir. 1997).

This Court's requirement that legislative restrictions on free speech be supported by at least some modicum of "evidence" is not new, extreme, nor novel:

> ". . . **[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the first Amendment**. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial governmental interest," ante, at 68, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as de minimus . . .
>
> "However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight; it must be prepared both 'to articulate and support,' a reasoned and significant basis for its zoning decisions." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) (Emphasis added).

> "Here, Kandyland has had ample opportunity to **contest** the council's findings about secondary effects — before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. **In the absence of any reason to doubt it**, the city's expert judgment should be credited." *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000). (Emphasis added).

To distill the District Court's reasoning down to its "lowest common denominator," it is abundantly clear that the *only* "secondary effect" deemed by the District Court to be similar to those cases discussing the secondary effects doctrine was the sexually explicit nature of the communication at issue. Indeed, the District Court exhibited the same kind of confusion, or reluctance to respect or consider First Amendment protection in the area of sexual expression, that this Court invalidated in *United States v. Playboy Entertainment Group*, __ U.S. __, 120 S. Ct. 1878 (2000), where the section of the Telecommunications Act at issue therein, which required cable television operators who provided sexually oriented channels to either scramble their signals or limit their transmission to hours when children were unlikely to be viewing, was invalidated. This Court ultimately held that trying to stifle the communication at issue on the basis of the "idea" it represented (a "primary" rather than "secondary effect") was totally unacceptable under First Amendment principles.

Equally disturbing is the City's attempt to persuade this Court that the totally irrelevant issue of the residents' "employment" or "compensation" in some way casts doubt on the Eleventh Circuit's decision. The City even goes so far as to include a copy of the agreement between Respondent Autumn Dawn Marenger and Respondent Voyeur Dorm, L.C. in the Appendix to its Petition. The Eleventh Circuit acknowledged this issue and simply disregarded it as the "red herring" it was. The argument asserted by the City is disturbing because, while "strict construction of the language" of the City Code Section at issue is urged on the one hand, the subject City of Tampa Code Section does not *anywhere* mention employment, does not include employment as an "element" of the definition of "adult entertainment establishment," and is silent as to the issue of compensation. Indeed, none of these issues are relevant to the "secondary effects" doctrine, and, as urged previously by the Respondents in the Eleventh Circuit, there are hundreds of examples of situations where people are compensated for "home occupations" (which, in the City of Tampa include cosmetology, hair styling, pet grooming, auto repair, and other "occupations" where members of the public actually present themselves at residential premises) or services performed in residential zoning districts, such as nurses, nannies, maids, or even "telecommuting," where people work and communicate with their offices and others by communicating over the internet, etc., none of which trigger zoning enforcement.

Ultimately, administrative interpretation of legislation is not entitled to deference when it goes beyond the meaning that legislation can bear. *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 105, 113, 109 S. Ct. 414, 419-420, 102 L. Ed. 2d 408 (1988). In the instant action, the result urged

by the Petitioner would be directly contrary to the exceptions carved out by the "secondary effects doctrine" and, most certainly, would render the municipal legislation at issue unconstitutional. In addition, the most cogent canon of statutory construction is that the evaluation of legislation must be done in the context of contemporary issues. This Court has held "evaluation of congressional action must take into account its contemporary legal context." *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S. Ct. 1186, 1190, 134 L. Ed. 2d 347 (1996) (plurality opinion) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 698-99, 99 S. Ct. 1946, 1958-59, 60 L. Ed. 2d 560 (1979)); *see also Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A*, 83 F.3d 1317, 1331 (11th Cir. 1996) (en banc) (recognizing principle that "Congress legislates against the background of the existing common law").

Applying these legal principles to this Petition, it is clear that any application of municipal zoning concepts to the "virtual reality" of the internet would result in expanding restrictions on free speech beyond any constitutional limit, and would result in the application of legislation adopted in the context of land use to a situation reflecting a form of communication never even dreamed of when the original legislation was adopted. Such simple minded, arbitrary "lockstep" application of legislation and legal principles would render the law nothing more than a tyrannical exercise, rather than the living and breathing organism that it must be to serve a free society.

CONCLUSION

The questions presented by the Petitioner do not accurately describe either the content or the impact of the Eleventh Circuit decision at issue. There are no issues of exceptional importance that have not already been resolved by this Court and there is nothing about the Eleventh Circuit decision which, in any way, detracts from a municipality's ability to regulate adult businesses through the *appropriate* use of the zoning power. Contrary to the assertions of the Petitioner, the utilization of a "webcam" that records the day-to-day activities of human beings living their lives does not justify the label of "staging and filming adult entertainment 24 hours a day."

This Court has previously evaluated the concepts of free speech in the context of the internet and there is no reason, much less any compelling reason, to revisit this issue in the misguided context of the arguments urged by the Petitioner. For all of the foregoing reasons, the Respondents respectfully request that this Court deny Petitioner, City of Tampa's Petition for a Writ of Certiorari.

Respectfully submitted,

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